Supreme Court, U.S.
FILED

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No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

CITY OF OCEANSIDE, JOHN MAMAUX,
Petitioners,

v.

WILLIAM SHAFER,
Respondent.

Petition for a Writ of Certiorari to the California Court of Appeal, Fourth Appellate District, Division One

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a government employer denies a job applicant a government benefit under 42 U.S.C. § 1983 by declining to hire the applicant allegedly because of his prior exercise of First Amendment free speech rights.
2. Whether governmental entities as employers may be subject to civil rights lawsuits for failing to hire job applicants based on allegations that the applicant was denied employment because of his free speech exercises.
3. Whether a First Amendment civil rights claim may be asserted by a job applicant having no property interest in a particular government job or position.

LIST OF PARTIES TO THE PROCEEDING IN THE COURT BELOW

1. William Shafer: Plaintiff and Petitioner in the courts below; Respondent in the current petition.
2. City of Oceanside: Defendant and Respondent in the court below; Petitioner in the current petition.
3. John Mamaux: Defendant and Respondent in the courts below; Petitioner in the current petition.

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PETITION FOR WRIT OF CERTIORARI

City of Oceanside and John Mamaux, the petitioners herein, respectfully pray that a writ of certiorari issue to review the judgment of the California Court of Appeal, Fourth Appellate District, Division One, entered in the above-entitled case on December 17, 1996.

OPINIONS BELOW

The opinion of the Court of Appeal, whose judgment is herein sought to be reviewed is an unpublished decision identified as Case Number D 021944, and is reprinted in the separate appendix to this Petition, at pages 2a-11a. The decision reversed and remanded the trial court's written Statement of Decision of August 3, 1994, which is reprinted in the separate appendix to this petition at pages 13a-19a. A timely Petition for Rehearing was denied by

the Court of Appeal on January 15, 1997; and is reprinted in the separate appendix at page 12a. A Petition for Review of Decision was filed with the Supreme Court of California on January 24, 1997, and was denied on March 12, 1997 and is reprinted in the separate appendix at page 1a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeal, Fourth Appellate District was entered on December 17, 1996. The Court of Appeal denied a timely petition for rehearing on January 15, 1997. On March 12, 1997, the Supreme Court of California denied a petition for hearing.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involved the First Amendment to the Constitution of the United States, which provides as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievance."

This case also involves the application of the First Amendment through the Fourteenth Amendment, Section 1, which provides as follows:

> "All person born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF CASE

This is a First Amendment civil rights case brought by respondent William Shafer pursuant to 42 U.S.C. § 1983. The lawsuit was filed against Mr. Shafer's former employer, petitioners City of Oceanside ("City") and John Mamaux when he was not rehired by the City after voluntarily resigning from his employment position.

Respondent William Shafer filed a Complaint alleging civil rights violations under 42 U.S.C. § 1983 against the City and its former City Manager, John Mamaux on September 21, 1992, based upon the following facts.

On or about June 4, 1991, while respondent was a permanent, full-time Firefighter/Paramedic with the City of Oceanside, his request for leave of absence from his position (based on his desire to operate his own painting business and related matters) was denied. On June 30, 1991, respondent voluntarily resigned from his employment with the City of Oceanside for "another job—career move". Respondent understood that he would be eligible for "consideration for reinstatement" for up to two years under certain provisions of the City Personnel Rules and Regulations. Respondent subsequently requested reinstatement for employment and on January 29, 1992, petitioner City of Oceanside notified respondent that his name had been certified to the Oceanside Fire Department for "possible" reinstatement of employment as a Firefighter/Paramedic. However, respondent was considered an original job applicant under the City rules and was not hired back with the City in 1992.

Respondent alleged that he was denied employment in retaliation for writing a letter to the editor of the Blade Citizen newspaper on or about December 1990, while respondent was employed as a Firefighter. At that time respondent suffered no adverse employment action or formal discipline. This letter was, in respondent's opinion, critical of the City's management of the Firefighter/

Parademic program; and based on that, respondent alleged he was denied First Amendment civil rights when he was not hired back by the City.

After a *successful demurrer*, respondent filed an Amended Complaint which survived a second demurrer in 1992.

The Amended Complaint alleged two "counts" of civil rights violations. The first count alleged that respondent had a vested property right in reinstatement, i.e., re-employment with the City premised upon a de facto policy of rehiring firefighters who resigned in good standing and sought timely rehire. The second count alleged First Amendment infringement of free speech rights.

Respondent maintained that the sole reason he was not hired back by the City in 1992, was because of the newspaper article he wrote in 1990 that disagreed with the operation of the Fire Department. The Amended Complaint further stated a cause of action against petitioner John Mamaux for conspiracy to violate respondent's civil rights, in violation of 42 U.S.C. § 1985, and a cause of action for intentional infliction of emotional distress.

Petitioners later filed Motions for Summary Judgment directed at respondent's lack of guaranteed or property right to employment and the lack of legal authority supporting a cause of action against an employer for refusing to hire a job applicant allegedly because of something the applicant may have said. The Court, however, denied the motions and the matter proceeded to trial.

THE RULINGS BELOW

The trial in this matter commenced on January 18, 1994. The California Superior Court determined, after reviewing briefs and arguments, that the question of the existence of a property right in reemployment could not be assumed, but was a question of law to be determined by the Court. The trial Court therefore bifurcated the

trial and discharged the jury pending the determination of whether respondent had any property or fundamental right to rehire. The trial Court determined that the evidence at trial overwhelmingly supported the petitioners and that all respondent had was a unilateral or mistaken belief that he could resign from the City and then later reclaim a job back. At a hearing on March 4, 1994, the Court held that respondent had not sustained the burden of establishing a vested property right. In addition, the trial Court determined that respondent could not state a claim for violation of free speech rights in that he was in the same position as any new job applicant seeking hire, who could be permissibly denied employment for any number of discretionary reasons. Finally, the trial Court held that the cause of action against petitioner John Mamaux for intentional infliction of emotional distress was interrelated to the civil rights violation and therefore had to be dismissed along with the other causes of action. The trial court issued its formal Written Statement of Decision on August 3, 1994. Appendix at pages 13a-19a.

Respondent filed a Notice of Appeal to the Court of Appeal on September 2, 1994. Respondent did not appeal the Court's ruling on the due process claim. Respondent likewise did not appeal the Court's decision regarding the lack of property right to employment. Respondent appealed the Court's ruling on the free speech claim and the conspiracy and intentional infliction of emotional distress claims.

The Court of Appeal reversed the trial court on the free speech and intentional allocation of emotional distress causes of action. The Court held that despite the lack of appellant's right to a job with the City, he had a right as a matter of federal law to go to trial to determine whether the newspaper article he wrote played a factor in violation of his rights to free speech in the City's decision not to hire him. (Citing *Mount Healthy City Bd. of Ed. v. Doyle,* 429 U.S. 274 (1977).) The Court stated that the issue

to be decided was whether the respondent's free speech in writing a newspaper article served to deny him a government benefit of having an opportunity to obtain a job with the City. Appendix at pages 2a-11a. Petitioners sought discretionary review in the Supreme Court of California. The Court denied review on March 12, 1996. Appendix at page 1a.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO CLARIFY ISSUES RELATED TO FREE SPEECH AND GOVERNMENT EMPLOYMENT

The lower court concluded that the respondent may state a claim as a job applicant for employment for denial of his First Amendment rights. However, the court enunciated a strained interpretation of this Court's First Amendment rulings on point.

The respondent in this case voluntarily resigned from the City to pursue other employment. He subsequently had a change of heart and decided to seek hire with the City again. Therefore, the respondent stood in the same position as an original job applicant for purposes of this matter and appeal.

While conceding that the respondent had no property right to reemployment or reinstatement, the lower court analyzed his claim akin to a termination of employment or employment discharge case.

With this as a backdrop, the Court of Appeal analyzed this case affording the respondent a heightened right to a government job, which was arguably denied when the City decided not to hire him. The Court ruled that the respondent should be allowed to prove the denial of a government employment due to his free speech claims. (Citing *Rutan v. Republican Party*, 497 U.S. 62 (1990).)

The Court of Appeal has opened the floodgate of litigation against the City and governmental entities. Under

the Court's First Amendment analysis, any applicant for a governmental job may now claim that she/he was denied employment because she/he prior to employment, criticized the governmental entity or its operations, in an interview, resume, writing, etc. If not hired, the applicant could then pursue a civil rights claim for a First Amendment deprivation. Such a scenario could lead to countless meritless lawsuits against the City and other governmental entities.

In reaching its decision, the Court relied upon several cases enunciated by this Court and other federal courts. The Court cited *Perry v. Sindermann,* 408 U.S. 593 (1972), where this Court afforded a civil rights action to a teacher whose contract was not renewed, allegedly because of his free speech exercise. In deciding that such an action could be brought, the Court ruled that the respondent's lack of a contractual or tenure "right" to reemployment was immaterial to his free speech claim.

Similarly, the Court cited *Hyland v. Wonder,* 972 F.2d 1129 (9th Cir. 1992), where the Court of Appeal ruled that a government volunteer could not be denied the right to volunteer because of critical comments. Neither of the above cases addressed a situation involving *applicants* for employment or positions. In both situations, the affected individuals held positions which were subsequently denied them, or taken from them due to their free speech. Such a scenario presents a different analysis form this case involving a job applicant.

In *Board of County Commissioners v. Umbehr,* —— U.S. ——, 116 S.Ct. 2361, (1996), this Court extended First Amendment protection to those who independently contract with municipalities, ruling that termination of contracts for free speech exercises violates the First Amendment. However, in discussing its ruling, this Court stated that its holding only pertained to situations where a "pre-existing commercial" relationships already exist. (*Id.* at 116 S.Ct. 2352.) In this sense, *Umbehr* is con-

sistent with *Perry v. Sindermann* holding that non-renewal or termination of a *pre-existing relationship* for free speech reasons violates the First Amendment. In fact, this Court refused to discuss the situation as in the instant case where such a pre-existing relationship does not exist. (*Board of County Commissioners v. Umbehr, supra,* at U.S. ——, 116 S.Ct. 2342, 2352.)

This case presents the opportunity for this Court to clarify and apply the decision in *Umbehr* to job applicants for government employment. Absent such guidance, employers will be left to speculate as to how to handle job applicants who may have expressed critical speech prior to the hiring process.

II. CERTIORARI SHOULD BE GRANTED TO DEFINE A STANDARD UNDER WHICH MUNICIPALITIES CAN EXERCISE HIRING DISCRETION TO EVALUATE JOB APPLICANTS

The factual record below is clear that the respondent, as a former City employee, had no rights to job reinstatement *per se*. As such, the trial Court ruled that the respondent was an original job applicant for purposes of this action. The trial Court's ruling in this regard was not appealed.

The Court of Appeal incorrectly decided important, broad based free speech issues as to federal rights and a municipality's abilities to evaluate original job applicants in the context of hiring decisions. Moreover, the Court failed to define any standard by which the City or any governmental entity may validly weigh job applicants and what they say about the job, etc. when making employment decisions. Under the Court's analysis, any job applicant's critical speech would trigger a First Amendment civil rights lawsuit if the applicant was not hired by the governmental employer.

The Court failed to define what type of specific comment is valid and when a municipality may rely on the

comment in making an employment decision. In this regard, comments in a job interview, on a resume, application, as well as in a newspaper qualify as potential civil rights violations where applicants claim, without more, reliance on the comments as reasons for job rejections.

Furthermore, the job applicant alone has power to define what constitutes "critical" expression in these actions. In essence, the applicant has more rights than an employee and may define his or her speech as being critical of the employer as the applicant sees fit, for purposes of these "new civil rights" actions.

This result offers the City no guidance in exercising valid hiring discretion or evaluating, for example, a job applicant's attitudes or abilities to work within a particular job structure. The City is now in no position to determine whether a person's comments or response make that person a fitting job candidate or not. Similarly, the City has no clear way to evaluate a person's positive or negative attitudes about a potential job without being subject to a civil rights lawsuit and possible liability for First Amendment infringement.

These are all questions that are left unanswered by the Court's decision and *Board of County Commissioners v. Umbehr, supra,* at —— U.S. ——, 116 S.Ct. 2342, make this case proper for Certiorari.

CONCLUSION

WHEREFORE, petitioners respectfully pray that a Writ of Certiorari be granted.

Respectfully submitted,

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